94CV05391-TLM-JMA Jim Giokas DtP
Copies mailed

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Donald Brooks

versus

George Reading, et al.

DOCKET NO. 94 CV 5391

JUDGE MELANÇON

JUDGMENT

In accordance with the Memorandum Ruling issued on this date,

IT IS ORDERED that defendant's motion for summary judgment is GRANTED, dismissing plaintiff Donald Brook's claims under 42 U.S.C. § 1983 against defendant George Reading with prejuduce.

THUS DONE AND SIGNED at Brooklyn, this 22nd day of January, 1999.

TUCKER L. MELANÇON
UNITED STATES DISTRICT JUDGE

60

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Donald Brooks

versus

George Reading, et al.

Civil Action No. 94-5391

Judge Tucker L. Melançon

MEMORANDUM RULING AND JUDGMENT

Before the Court is a Motion for Summary Judgment filed by defendant George Reading, and plaintiff's opposition thereto. For the following reasons, the motion is granted.

I. Background

Plaintiff, Donald Brooks, instituted this suit against defendant, Suffolk County police officer George Reading, pursuant to 42 U.S.C.§ 1983 for use of excessive force during Officer Reading's arrest of plaintiff on December 1, 1991. It is undisputed that on December 1, 1991 plaintiff and Officer Reading were involved in a physical confrontation when Officer Reading responded to a call from the A&S Department Store regarding a stolen credit card. *(Defendant Reading's Statement Pursuant To Local Rule 56.1)*. The plaintiff was indicted for the crimes of Assault in the Second Degree, pursuant to New York Penal Law section 120.05(3), and Criminal Possession of Stolen Property in the Fourth Degree.[1] The plaintiff waived his right to a jury trial

[1] After the State rested its case, the court granted Brooks' motion to dismiss the count (continued...)

and requested the court to determine the issues that might be raised at a *Huntley* hearing within a non-jury trial which was held on February 1, 2, and 3, 1993. *(Id., Exh. E, February 9, 1993 decision of Joel L. Lefkowitz, Judge of the County Court).*

In his decision, Suffolk County Court Judge Joel L. Lefkowitz made the following findings of fact based on the testimony by Darren Buxton, A&S Operations Manager: "At about 5:00 p.m. on December 1, 1991, [Buxton] responded to the cash office at the [A&S] store. [Plaintiff] was with a female who was attempting to obtain $400.00 worth of gift certificates with a stolen A&S credit card. Mr. Buxton then saw [plaintiff] take out three other credit cards which all contained the name imprinted on the stolen A&S credit card. When [Buxton] noticed the two individuals quickly leave the area, he notified the Security Office and then followed the individuals out to the parking lot. Mr. Buxton observed the two go in separate directions. After apprehending the female, he then proceeded after [plaintiff] who had gotten into a car. [Plaintiff] complied with a request to step out of the car and asked why Mr. Buxton and the two store security detectives, Falcone and Tsourkas, were stopping him. They told him that it involved a stolen credit card and asked him to return with them to the store. [Plaintiff] refused and an altercation ensued. [Plaintiff] pushed Tsourkas who got

---

(...continued)
charging Criminal Possession of Stolen Property in the Fourth Degree.

[plaintiff] in a headlock while Mr. Buxton handcuffed him. The female was taken to the outer room of the security office and [plaintiff] was taken to the inner office. While the police were being called, detectives Falcone and Tsourkas agreed to uncuff [plaintiff], who was seated by a desk .... When Suffolk County Police Officer George Reading arrived, Mr. Buxton told him what had occurred with the defendant so far. Officer Reading first got identification from the female. However, [plaintiff] who was obviously agitated, refused to give his name. At this time Police Officer Luanne Alese had arrived and stayed with the female in the outer office. Officer Reading sat down behind the desk across from [plaintiff] and called the Fourth Precinct in an attempt to determine [plaintiff's] name. However, [plaintiff] kept cursing and saying that he knew the system and did not have to tell them. When Officer Reading said that [plaintiff] would have to go to Riverhead, [plaintiff] responded that he could do the time in Riverhead standing on his head.[2] "

Plaintiff testified at the County Court hearing giving his version of what happened from the point he was encountered in the A&S parking lot by Buxton, the two security detectives, and the cashier through the time of the altercation in question involving Officer Reading. *(Id., Exh. D, Direct Examination of Brooks).* While

---

[2] Plaintiff testified that Officer Reading stated "let me tell you something, buddy, I can't wait until the niggers are fucking you in the ass in Riverhead." *(Defendant Reading's Statement Pursuant To Local Rule 56.1, Exh. D, Direct Examination of Brooks, p. 215).*

plaintiff does not dispute the facts as determined by the County Court judge as set out above, thereafter, the parties' account of what transpired differs greatly. According to plaintiff, following Officer Reading's remark about Riverhead plaintiff stood up and without provocation Officer Reading attacked plaintiff by repeatedly hitting him in the head and ribs while Reading and the two security detectives held plaintiff down on a desk. *(Id. at pp. 219-222)*. Plaintiff further contends that following the beating Officer Reading "bulldozed" him into the wall where his head went into the sheetrock, and then threw plaintiff on the floor where Reading stomped on his right hand before plaintiff was handcuffed. *(Id. at pp. 222-23)*. Plaintiff alleges that he never struggled with Officer Reading during the incident and that he never reached for or touched the officer's weapon at any time. *(Id. at pp. 220 & 227)*.

Following the beating, plaintiff testified he made several remarks to Officer Reading including: "Do you feel good about yourself?"; "Do you feel like a tough guy because of that?"; "Do you have trouble looking in the mirror, too?"; "Well, you might think it's a joke right now, but do you think that man in the suit [Mr. Buxton] when we went into court, do you think he's going to testify to a story that you are going to create and perjure himself for the sake of covering an assault up for you?"; and "Do you see that girl there -- do you really think that she's going to?" Plaintiff also stated that he passed out after the incident in the police car and while he was at the hospital *(Id. at*

hand. He was out of work for the three weeks that his hand was in a cast." *(February 9, 1993 decision of Joel L. Lefkowitz, Judge of the County Court, p. 2).*

In his memorandum of decision, Judge Lefkowitz found plaintiff's account of the altercation to be incredible. *(February 9, 1993 decision of Joel L. Lefkowitz, Judge of the County Court, p. 3).* The judge based his ruling on the testimony of Officers Reading and Alese which he found to credible, as well as Darren Buxton's testimony which he also found to be credible and to "corroborate every material fact of the Officer's testimony." *Id.* Regarding plaintiff's testimony, the judge specifically found incredible the following: "[plaintiff's] claim that he remained calm throughout the incident, and that while covered with blood and while lapsing in and out of consciousness after having been punched, kicked and stomped on by Officer Reading, he calmly asked the Officer if he was proud of himself. He also questioned whether the officer thought it likely that Mr. Buxton and the female store employee would lie for him at trial." *Id.*

Based on the judge's findings of fact, plaintiff was found guilty of Assault in the Second Degree. The conviction was affirmed and remains undisturbed at this time. *(Defendant's Preliminary Statement, p. 2).*

II. Summary Judgment Standard

A motion for summary judgment shall be granted if the pleadings, depositions, and affidavits submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56.* When a party seeking summary judgment bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence were uncontroverted at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). As to issues which the non-moving party has the burden of proof at trial, the moving party may satisfy this burden by demonstrating the absence of evidence supporting the non-moving party's claim. *Celotex Corp.*, 477 U.S. at 324.

Once the movant produces such evidence, the burden shifts to the respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. *Id.* at 322-23. The responding party may not rest on mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). If no issue of fact is presented and if the mover is entitled to judgment as a matter of law, the court is required to render the judgment prayed for. *Celotex Corp.*, 477 U.S. at 322; *Fed. R. Civ. P. 56(c).* Before it can find that there are no genuine issues of material fact, however, the court must be satisfied that no reasonable trier of

fact could have found for the non-moving party. *Id.; see Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 116 (2d Cir. 1991).

III. Analysis

Plaintiff asserts an excessive force claim against defendant pursuant to Title 42 of the United States Code section 1983. Defendant contends that plaintiff's claim is barred because plaintiff's conviction collaterally estops plaintiff from now claiming that Officer Reading attacked him and also bars plaintiff's claim because a judgment in his favor would imply the invalidity of his conviction under *Heck v. Humphrey*, 512 U.S. 477 (1994). Alternatively, defendant asserts that Officer Reading is entitled to qualified immunity in light of plaintiff's hostile actions toward him.

1. Whether plaintiff is barred by collateral estoppel

Judgments rendered by state courts are entitled to the same full faith and credit in federal courts as they would receive in the courts of the state in which they were rendered. 28 U.S.C. § 1738. Furthermore, "issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal section 1983 suit as they [would] enjoy in the courts of the State where the judgment was rendered." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 83 (1984). The doctrine of collateral estoppel prevents a party from relitigating an issue of fact or law that has been decided in an earlier action. *Metromedia Co. v. Fugazy*,

983 F.2d350 (2d Cir.1992). Collateral estoppel applies to a plaintiff in a section 1983 action who attempts to relitigate in federal court issues already decided against him in a state criminal proceeding. *Allen v. McCurry*, 449 U.S. 90, 102 (1980). Two requirements must be satisfied before a party is entitled to invoke the collateral estoppel doctrine in New York: (1) there must be an identity of issues which were necessarily decided in the prior action, and (2) the party precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination. *Mitchell v.* Keane, 974 F.Supp.332, 339 (S.D.N.Y.1997), *citing Schwartz v. Pub. Adm'r of Bronx*, 24 N.Y.2d65, 71 (1969).

Here, plaintiff contends that Officer Reading launched an unprovoked attack upon him after plaintiff returned to A&S Department Store and during the time plaintiff was in the detention room with the store detectives, the manager and the cashier. Plaintiff asserts that it was this attack which caused his injuries, specifically the wound to his head. The Suffolk County Court Judge considered the same allegations in testimony from Brooks in making his ruling that plaintiff's version of the facts related to the incident was not credible and ruled that the incident was the result of the action necessarily taken by defendant in order to restrain plaintiff after plaintiff assaulted Officer Reading. Specifically, the judge ruled that plaintiff's head wound from hitting the sheetrock wall was caused by the force necessary to get plaintiff off

of Officer Reading. *(February 9, 1993 decision of Joel L. Lefkowitz, Judge of the County Court).*

The Suffolk County Court's ruling evidences that the collateral estoppel doctrine's identicalness of issue requirement is met in this matter. In the criminal case in which plaintiff was charged with and indicted for assault in the second degree of Officer Reading, the trial court considered whether plaintiff assaulted Officer Reading or was the victim of an unprovoked attack by Officer Reading, against which plaintiff did not try to defend. Plaintiff's excessive force claim in the instant matter involves the same question as in the criminal case, that is, whether plaintiff was the victim of the use of excessive force by Officer Reading in an incident which was unprovoked and undefended by plaintiff.

The second requirement that plaintiff must have had a full and fair opportunity to contest the prior determination is also met in this case. The trial court record before the Court confirms that plaintiff was allowed the opportunity to present to the court his version of the altercation with Officer Reading. *(Defendant's Preliminary Statement, Exh. D, testimony of Brooks; Exh. E, February 9, 1993 decision of Joel L. Lefkowitz, Judge of the County Court).* Further, plaintiff does not dispute that he was provided a full and fair opportunity to litigate the criminal charges against him in the Suffolk

County Court proceeding in which one of the charges against plaintiff, the criminal possession of stolen property charge, was dismissed.

Defendant contends that under New York law plaintiff's conviction estops him from proceeding upon his excessive force claim. *Orraca v. City of New York*, 897 F.Supp. 148 (S.D.N.Y.1995); *Pastre v. Weber*, 717 F.Supp. 987 (S.D.N.Y.1988). While plaintiff does not dispute that preclusive effect is to be given a state conviction in a section 1983 action involving the same factual claims, plaintiff argues that the cases cited by defendant are distinguishable. Plaintiff asserts that in the cases cited by defendant the plaintiffs claimed they were defending themselves against the police officers' aggression, where as in the instant case plaintiff claims he submitted to the officer's use of force. *(Plaintiff's Memorandum in Opposition)*.

The issue here is not whether plaintiff defended himself in the altercation in question, but rather whether plaintiff asserts the same factual claims in this matter as in the prior criminal litigation. The Suffolk County Court considered the same factual issues asserted by plaintiff in the instant matter, and plaintiff is thus precluded from relitigating the issues.

2. Whether a judgment in plaintiff's favor would imply the invalidity of his conviction

Even assuming *arguendo* that collateral estoppel does not preclude plaintiff's section 1983 claim in this instance, plaintiff's claim is precluded by the Supreme

Court's ruling in *Heck v. Humphrey*, 512 U.S.477 (1994). If a judgment pursuant to Title 42 of the United States Code section 1983 in favor of plaintiff would necessarily imply the invalidity of plaintiff's conviction, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction has already been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S.477 (1994). A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under Title 42 of the United States Code section 1983. *Id. at 487.* Thus, a district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of a plaintiff's conviction or sentence. *Id.* If the district court determines that plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed. *Id.*

As set out above, according to *Heck*, this Court must consider whether a judgment in favor of plaintiff on his excessive force claim would necessarily imply the invalidity of his conviction. *Heck*, 512 U.S. at 487. Here, plaintiff was convicted of assault in the second degree pursuant to New York Penal Law section 120.05, subdivision 3, which provides "[a] person is guilty of assault in the second degree

when: . . . 3. With intent to prevent a peace officer, police officer, . . . from performing a lawful duty, . . . he causes physical injury to such peace officer, police officer, . . . Assault in the second degree is a class D felony. NY PENAL § 120.05(3); *Defendant's Preliminary Statement, p.1, n.1, Exhs. A & C.*

Defendant maintains that it was plaintiff who was violent and abusive, thus rendering it necessary to resort to some degree of force in order to protect himself. *(Defendant's Preliminary Statement).* As provided in the foregoing, plaintiff was found guilty of second degree assault on defendant. A claim for use of excessive force, unlike a claim for malicious prosecution or false arrest, does not necessarily imply the invalidation of a conviction. *Pichardo v. New York Police Department*, 1998 WL 812049, November 18, 1998 (S.D.N.Y.)*citing Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir.1996); *Wright v. Naranjo*, 1996 WL 449276, 3, August 1, 1996 (E.D.N.Y.). Therefore, plaintiff's conviction does not automatically require the dismissal of this claim. *Id.*

In his determination that plaintiff was guilty of assault on Officer Reading the Suffolk County Court Judge found Officer Reading's account of the facts surrounding the altercation in question to be the credible version. The trial judge determined that the altercation was the result of action necessarily taken by Officer Reading in order to restrain plaintiff after plaintiff assaulted him, and specifically that plaintiff's head

wound was the result of the use of that force. *(February 9, 1993 decision of Joel L. Lefkowitz, Judge of the County Court).* Here, plaintiff alleges that he was completely submissive to defendant and did not provoke the incident in question. As such, plaintiff contends that defendant's entire account of the incident is false. In order for plaintiff to prevail on his section 1983 claim, the trier of fact would have to entirely reject defendant's account of the incident which was specifically found to be the credible version of the facts by the trial judge, and thus undermine the factual basis for plaintiff's conviction. Accordingly, plaintiff's excessive force claim must be dismissed under the holding of *Heck v. Humphrey*.

3. Whether defendant's actions were objectively reasonable

Defendant contends in the alternative that his actions were objectively reasonable in light of the circumstances confronting him and he should be granted qualified immunity from plaintiff's excessive force claim. Where a claim of excessive force arises in the context of an arrest, "it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ...against unreasonable ...seizures' of the person." *Graham v. Connor*, 490 U.S. 386, 394 (1989). To establish a Fourth Amendment "excessive force" claim, a plaintiff must show that the force used by the officer was, in light of the facts and circumstances confronting him, "objectively unreasonable"

under Fourth Amendment standards. *Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990). The reasonableness of the force used is "judged from the perspective of a reasonable officer on the scene" and takes into account factors such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

In this case, the Suffolk County Court Judge determined that "[plaintiff] had touched the Officer's weapon" during the struggle initiated by plaintiff. *(February 9, 1993 decision of Joel L. Lefkowitz, Judge of the County Court, page 2)*. The judge also found that the force used to get plaintiff off of Officer Reading "caused [plaintiff] and Officer Reading to hit the far wall" prior to plaintiff being subdued and handcuffed. *Id.*

Officer Reading was faced with a person who was uncooperative and who attacked the Officer and attempted to obtain the Officer's weapon. The injuries suffered by plaintiff resulted from Officer Reading's use of force which the trial judge found was necessary in confronting plaintiff's attack. In light of the facts of the incident in question as determined by the Suffolk County Court Judge, Officer Reading's actions were objectively reasonable in light of the circumstances confronting him.

Conclusion

Based on the foregoing, defendant is entitled to summary judgment on plaintiff's section 1983 claim for excessive force.